

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

STATE OF WASHINGTON,

Plaintiff,

v.

FRANCISCAN HEALTH SYSTEM d/b/a
CHI FRANCISCAN HEALTH;
FRANCISCAN MEDICAL GROUP; THE
DOCTORS CLINIC, a Professional
Corporation; and WESTSOUND
ORTHOPAEDICS, P.S.,

Defendants.

NO. 3:17-cv-05690-BHS

CONSENT DECREE

WHEREAS, Plaintiff State of Washington, by and through its Attorney General (“State”), having conducted an investigation of the affiliations between Defendants Franciscan Health System and Franciscan Medical Group (collectively, “Franciscan”), The Doctors Clinic, A Professional Corporation (“TDC”) and Westsound Orthopaedics, a Professional Services Corporation (“WSO”), and having filed a Complaint alleging violations of Section 1 of the Sherman Act, 15 U.S.C. § 1, Section 7 of the Clayton Act, 15 U.S.C. § 18, and the Washington Unfair Business Practices - Consumer Protection Act, Wash. Rev. Code § 19.86.030 and

1 19.86.060, against Defendants in *State of Washington v. Franciscan Health System, et al.*,
2 No. 3:17-cv-05690-BHS; and

3 **WHEREAS**, on March 1, 2019, the Court denied summary judgment for Franciscan and
4 TDC on the State's claims challenging the TDC Affiliation pursuant to Sherman § 1 and Wash.
5 Rev. Code § 19.86.030, and granted summary judgment for Franciscan and WSO on the State's
6 claims challenging the WSO Acquisition pursuant to Clayton Act § 7 and Wash. Rev.
7 Code § 19.86.060; final judgment has not yet been entered with respect to any of the State's
8 claims; and
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10 **WHEREAS**, WSO is a party to this Consent Decree only as to its and the State's release
11 of claims, covenant not to sue, entry of final judgment, and attorneys' fees, costs, and appeal
12 provisions; and WSO is not bound by the injunctions, notice, reporting or disclosure
13 requirements of this Consent Decree; and
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15 **WHEREAS**, to settle all of the State's claims, and without admitting liability or fault,
16 Franciscan and TDC have agreed to undertake certain conduct and Franciscan has agreed to
17 make certain divestitures; and

18 **WHEREAS**, this consent agreement is for settlement purposes only and does not
19 constitute an admission by Defendants that any law has been violated or that the facts alleged in
20 the Complaint are true; and
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22 **WHEREAS**, Defendants agree that this Court has jurisdiction over them and the subject
23 matter in this action; and

24 **WHEREAS**, Defendants agree to be bound by the provisions of this Consent Decree,
25 pending its approval by the Court and thereafter;
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1 **NOW THEREFORE**, there being no just reason for delay in resolving the claims
2 alleged in Plaintiff's Complaint against Defendants, without trial or adjudication of any issue of
3 fact or law on the State's claims relating to the TDC Affiliation, and upon the consent of the
4 parties hereto, it is hereby **ORDERED, ADJUDGED AND DECREED** as follows:
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6 **I. JURISDICTION**

7 1. Defendant Franciscan Health System, doing business as CHI Franciscan, is a
8 non-profit corporation organized and existing under the laws of Washington, with its
9 headquarters at 1717 South J Street, Tacoma, Washington 98405.

10 2. Defendant Franciscan Medical Group, also doing business as CHI Franciscan, is
11 a non-profit corporation organized and existing under the laws of Washington, with its
12 headquarters at 1313 Broadway Plaza, Suite 2000, Tacoma, Washington, 98201.

13 3. Defendant The Doctors Clinic is a professional corporation organized and
14 existing under the laws of Washington, with its headquarters at 9621 Ridgetop Boulevard NW,
15 Silverdale, Washington, 98383.

16 4. Defendant WSO is a professional services corporation organized and existing
17 under the laws of Washington, with its headquarters located at 4409 NW Anderson Hill Road,
18 Silverdale, Washington 98383. WSO sold its assets to CHI Franciscan on or about July 1, 2016,
19 and its physicians became employees of Franciscan Medical Group. WSO now has no employees
20 and no business activities.
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22 5. This Court has jurisdiction over the subject matter of this action and over each of
23 the parties hereto. The Complaint states a claim upon which relief may be granted against
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1 Franciscan and TDC under Section 1 of the Sherman Act, 15 U.S.C. § 1, and under Wash. Rev.
2 Code § 19.86.030, alleged in the Complaint as a supplemental state claim.

3 6. The Washington State Attorney General has the authority to bring this action on
4 behalf of the State pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26, and Wash. Rev.
5 Code § 19.86.080.

6 7. Venue is proper in the United States District Court for the Western District of
7 Washington.

8 II. DEFINITIONS

9
10 **IT IS ORDERED** that, as used in this Consent Decree, the following definitions shall
11 apply:

12 8. “Acquirer” means any Person that acquires the Divestiture Assets.

13 9. “Adult PCP Services” means primary care physician services provided to any
14 person 18 years of age or older by Physicians who specialize in Family Medicine, General
15 Practice, or Internal Medicine and whose services are paid for by Commercial Payers.

16 10. “Ambulatory Surgery Center” or “ASC” refers to the facility located at
17 2200 Northwest Myhre Road, Silverdale, WA 98383.

18 11. “AGO” means the Antitrust Division of the Washington State Attorney General’s
19 Office.

20 12. “Commercial Payer” means any HMO or other Person that sells commercial
21 health insurance or other commercial health plans that cover the cost of Physician Services.
22 It includes any Person that develops, leases, or sells access to networks of Physicians, for the
23 creation of insurance products in the commercial market, including but not limited to commercial
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1 insurance, third-party administrator services, and other health plan services offered by Aetna,
2 Cigna, First Choice, Kaiser/Group Health, Premiera Blue Cross, Cambia/Regence Blue Shield,
3 and United Healthcare. It does not include government payers for public health insurance
4 programs, such as Medicare and Medicaid, or private entities that sell or manage government
5 insurance programs including but not limited to Managed Medicaid, Medicare Advantage, or
6 Tricare, but do not sell HMO, health insurance, or health plans in the commercial market.

8 13. “Commercial Payer Contract” means a contract or agreement for Physician
9 Services between Franciscan and a Commercial Payer, including but not limited to rates,
10 definitions, terms, conditions, policies, and pricing methodology. It does not include contracts
11 for government insurance programs such as Managed Medicaid, Medicare Advantage, or
12 Tricare, even if a party to the contract also sells commercial HMO, health insurance, or health
13 plans.
14

15 14. “Commercial Payer Department” means the Franciscan department that will be
16 responsible for or oversee Contract Administration for both Franciscan and TDC.

17 15. “Commercial Payer Contracting Information” means information concerning
18 Commercial Payer Contracts and negotiations with a specific Commercial Payer for Physician
19 Services that is identifiable as being connected with or provided by that Commercial Payer,
20 including charges, reimbursement rates, and documents and electronic health, billing and
21 accounts receivable records otherwise reflecting this information; provided, however, that
22 “Commercial Payer Contracting Information” shall not include: (i) information that is in the
23 public domain or that falls in the public domain through no violation of this Consent Decree or
24 breach of any confidentiality or nondisclosure agreement with respect to such information by
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1 Franciscan or TDC; (ii) information that becomes known to Franciscan or TDC from a third
2 party that has disclosed that information legitimately; (iii) information that is required by law to
3 be publicly disclosed; (iv) aggregate information concerning the financial condition of
4 Franciscan or TDC; or (v) aggregate Commercial Payer information in which specific
5 Commercial Payers are not identified or identifiable.
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7 16. “Contract Administration” means the act or acts associated with compliance with
8 and implementation of final contract terms, such as payment monitoring, communication of
9 Commercial Payer medical and administrative policies, utilization management, liaison to the
10 business office, annual updates, and organizing Commercial Payer Contract-related budget
11 information.
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13 17. “Defendant” or “Defendants” means Franciscan, WSO and/or TDC, as defined
14 in this Consent Decree.

15 18. “Divestiture Agreement” means any agreement between Franciscan and an
16 Acquirer that receives the prior approval of the AGO to divest the Divestiture Assets, including
17 all related ancillary agreements, schedules, exhibits, and attachments thereto, that have received
18 the AGO’s prior approval.
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20 19. “Divestiture Assets” means a controlling share of the Ownership Interest of the
21 Ambulatory Surgery Center.

22 20. “Effective Date” means the date this Consent Decree is entered by the Court.

23 21. “Franciscan” means Franciscan Medical Group and Franciscan Health System
24 (including Harrison Medical Center) collectively, d/b/a CHI Franciscan, along with their
25 directors, officers, employees, agents, representatives, successors, and assigns; joint ventures,
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1 subsidiaries, divisions, groups and affiliates controlled by CHI Franciscan, and the respective
2 directors, officers, employees, agents, representatives, successors, and assigns of each. For
3 purposes of this consent decree, the definition of Franciscan does not include The Doctors Clinic
4 or WSO, and does not include CommonSpirit Health or its affiliates other than Franciscan.
5

6 22. “Franciscan Negotiating Team” means the team responsible for negotiating a
7 Commercial Payer Contract for Physician Services for Franciscan.

8 23. “HMO” means an organization receiving a certificate of registration pursuant to
9 Wash. Rev. Code 48.46.

10 24. “Hospital-Based Physicians” means physicians for whom Franciscan contracts
11 with payers solely for payment for inpatient and outpatient services the physician provides at
12 facilities in which Franciscan owns the majority share of the facility and does not include those
13 physicians when they practice at other locations, including but not limited to physician-owned
14 clinics.
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16 25. “KP/BI” means the Kitsap Peninsula, including Bainbridge and Fox Islands and
17 the central peninsula towns of Bremerton, Silverdale and Poulsbo, along with Gig Harbor located
18 in Pierce County at the southern end of the peninsula.
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20 26. “Non-Commercial Payer Contracting Information” means any information
21 relating to a contract that does not meet the definition of a Commercial Contract, including
22 contracts for government insurance programs such as Managed Medicaid, Medicare Advantage,
23 or Tricare.
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1 27. “Orthopedic Physician Services” means Physician Services customarily provided
2 by, and actually provided by, board-certified or board-eligible orthopedic surgeons to treat
3 injuries of the bones, joints, ligaments, tendons, and muscles and paid for by Commercial Payers.

4 28. “Ownership Interest” means any and all rights, present or contingent, of
5 Franciscan to hold any voting or nonvoting stock, share capital, equity or other interests or
6 beneficial ownership in an entity.

7 29. “Person” means any individual, partnership, joint venture, firm, corporation,
8 association, trust, unincorporated organization, joint venture, or other business or government
9 entity, and any subsidiaries, divisions, groups or affiliates thereof.

10 30. “Physician Services” means Adult PCP Services or Orthopedic Physician
11 Services provided to patients, paid for as professional services by Commercial Payers.

12 31. “Physician” means a doctor of allopathic medicine (“M.D.”) or a doctor of
13 osteopathic medicine (“D.O.”).

14 32. “Physician Group” means an entity that employs Physicians.

15 33. “Pre-existing Commercial Payer Contract” means a Commercial Payer Contract
16 between a Commercial Payer and Franciscan that is in effect on the Effective Date of this
17 Consent Decree.

18 34. “PSA” means the Professional Services Agreement that TDC and Franciscan
19 entered into on September 6, 2016.

20 35. “Qualified Arrangement” means a Qualified Clinically-Integrated Joint
21 Arrangement or a Qualified Risk-Sharing Joint Arrangement between (1) Franciscan or TDC on
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1 the one hand; and (2) Physicians or Physician Groups other than Franciscan or TDC, on the other
2 hand.

3 36. “Qualified Clinically-Integrated Joint Arrangement” means an arrangement to
4 provide Physician Services at locations in KP/BI in which:

- 5
- 6 a. all Physicians or Physician Groups who participate in the arrangement participate
7 in active and ongoing programs of the arrangement to evaluate and modify the
8 practice patterns of, and create a high degree of interdependence and cooperation
9 among, the Physicians or the Physician Groups who participate in the
10 arrangement, in order to control costs and ensure the quality of services provided
11 through the arrangement; and
- 12 b. any agreement concerning price or other terms or conditions of dealing entered
13 into by or within the arrangement is reasonably necessary to obtain significant
14 efficiencies that result from such integration through the arrangement.
15

16 37. “Qualified Risk-Sharing Joint Arrangement” means an arrangement to Provide
17 Physician Services at locations in KP/BI in which:

- 18 a. all Physicians or Physician Groups who participate in the arrangement share
19 substantial financial risk through their participation in the arrangement and
20 thereby create incentives for the Physicians or Physician Groups who participate
21 jointly to control costs and improve quality by managing the provision of
22 Physician Services such as risk-sharing involving:
- 23 i. the provision of Physician Services at a capitated rate;
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- 1 ii. the provision of Physician Services for a predetermined percentage of
2 premium or revenue from Payers;
3 iii. the use of significant financial incentives (e.g., substantial withholds) for
4 Physicians or Physician Groups who participate to achieve, as a group,
5 specified cost containment or quality improvement goals, or
6 iv. the provision of a complex or extended course of treatment that requires
7 the substantial coordination of care by Physicians in different specialties
8 offering a complementary mix of services, for a fixed, predetermined
9 price, when the costs of that course of treatment for any individual patient
10 can vary greatly due to the individual patient's condition, the choice,
11 complexity, or length of treatment, or other factors; and
12
13 b. any agreement concerning price or other terms or conditions of dealing entered
14 into by or within the arrangement is reasonably necessary to obtain significant
15 efficiencies that result from such integration through the arrangement.
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17 38. "TDC" means The Doctor's Clinic, a professional corporation organized and
18 existing under the laws of Washington, with headquarters at 9621 Ridgetop Boulevard NW,
19 Silverdale, WA 98383.
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21 39. "TDC Affiliation" means the 2016 affiliation of Franciscan with TDC, consisting
22 of the following principal agreements: (1) the Asset Purchase Agreement by which Franciscan
23 acquired certain assets TDC used to provide medical services to patients; (2) the Asset Lease
24 Agreement, by which Franciscan leased certain assets TDC used to provide medical services to
25 its patient; (3) the Professional Services Agreement, by which TDC agreed to perform medical
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1 services exclusively for Franciscan’s patients and through which Franciscan agreed to pay TDC
2 for these services and provide TDC the assets needed to perform the services; and
3 (4) the Management Services Agreement by which Franciscan engaged TDC to provide certain
4 management, administrative, consulting and other related services on Franciscan’s behalf. “TDC
5 Affiliation” also includes related ancillary agreements, amendments, schedules, exhibits, and
6 attachments thereto.
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8 40. “TDC Negotiating Team” means the team responsible for negotiating the prices
9 and terms on which TDC will provide Physician Services when a Commercial Payer elects to
10 negotiate those terms separately from Franciscan.
11

12 41. “WSO Acquisition” means the July 1, 2016 agreement between Franciscan and
13 WSO whereby Franciscan acquired all of the assets of WSO, a physician practice with six
14 orthopedists, and employed those physicians.
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16 42. “wRVU” means fee-for-service, productivity-based compensation tied to work
17 Relative Value Units used by the Centers for Medicare and Medicaid Services to set Medicare
18 payment rates.
19

20 **III. APPLICABILITY**

21 43. The injunction, notice, reporting and disclosure provisions of this Consent Decree
22 shall apply to Franciscan and TDC, their successors and assigns, their subsidiaries, affiliates,
23 directors, officers, managers, agents, and employees. Those provisions shall not apply to
24 CommonSpirit Health or its subsidiaries, affiliates, directors, officers, managers, agents, and
25 employees, other than Franciscan. The release, covenant not to sue, and final judgment, costs,
26 attorneys’ fees, and appeal provisions of this Consent Decree shall apply to all Defendants, and

1 their successors and assigns, their subsidiaries, affiliates, directors, officers, managers, agents,
2 and employees.

3 44. Within thirty (30) days after the Effective Date, Defendants shall send by first
4 class mail, return receipt requested, a copy of this Consent Decree to each member of their
5 Boards of Directors, Franciscan's Executive Leadership Team, Franciscan and TDC attorneys
6 and corporate responsibility officers assigned to Franciscan and TDC, respectively, and each of
7 Franciscan and TDC's officers or employees who have responsibility for: (i) negotiating
8 commercial payer contracts; (ii) recommending, designing, or implementing transactions or
9 contracts with Physicians or Physician Groups.
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11 45. For seven (7) years following the Effective Date, within ten (10) days of
12 appointment of any new employee of Franciscan or TDC described in the preceding paragraph,
13 Franciscan or TDC shall send by first class mail, return receipt requested, a copy of this Consent
14 Decree to such employee.
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16 46. Franciscan and TDC shall notify the AGO in writing at least thirty (30) days prior
17 to any proposed change that may affect their compliance obligations under this Consent Decree,
18 such as dissolution, assignment for the benefit of creditors, sale resulting in emergence of a
19 successor entity, creation or dissolution of subsidiaries, or any other change, that, in Defendants'
20 reasonable judgment, may affect compliance obligations under this Consent Decree. A copy of
21 this Consent Decree shall be given to any successor entity.
22

23 47. All parties agree that this Consent Decree is entered voluntarily and represents
24 the entire agreement of the parties. All parties agree and represent that any persons signing this
25 Consent Decree have been authorized to execute this Consent Decree.
26

1 **IV. FUTURE CONTRACT PROHIBITIONS AND NOTIFICATION**
2 **REQUIREMENTS**

3 48. For a period commencing on the Effective Date and continuing for seven (7)
4 years, Franciscan and TDC shall not, directly or indirectly, or through any corporate or other
5 device, on behalf of any Physician with respect to Physician Services in KP/BI:

6 a. Enter into, adhere to, participate in, maintain, organize, implement, enforce, or
7 otherwise facilitate any combination, conspiracy, agreement, or understanding
8 between or among any Physicians who are not their employees, when they
9 already employ Physicians who practice in the same specialty:
10

11 i. To negotiate on behalf of any Physician with any Commercial Payer;

12 ii. To deal, refuse to deal, or threaten to refuse to deal with any Commercial
13 Payer regarding any term, condition, or requirement upon which any
14 Physician deals, or is willing to deal, with any Commercial Payer,
15 including, but not limited to, price terms; or
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17 iii. Not to deal individually with any Commercial Payer, or not to deal with
18 any Commercial Payer other than through Franciscan or TDC.

19 b. Exchange or facilitate in any manner the exchange or transfer of information
20 among such non-employee Physicians concerning any such Physician's
21 willingness to deal with a Commercial Payer, or the terms or conditions,
22 including price terms, on which the Physician is willing to deal with a
23 Commercial Payer;

24 c. Attempt to engage in any action prohibited by subparts a or b of this Paragraph;
25 and
26

1 d. Encourage, suggest, advise, pressure, induce, or attempt to induce any Person to
2 engage in any action that would be prohibited by subparts a through c of this
3 Paragraph.
4

5 **Provided, however,** that nothing in § IV shall prohibit any agreement or conduct
6 that, subject to the requirements of this Consent Decree: (1) is reasonably necessary
7 to form, participate in, or take any action in furtherance of a Qualified Risk-Sharing
8 Joint Arrangement or a Qualified Clinically-Integrated Joint Arrangement; (2) relates
9 to an arrangement that existed when this Consent Decree was entered, including
10 RHN, (3) relates to arrangements by which Franciscan pays Hospital-Based
11 Physicians to provide services at facilities in which Franciscan owns the majority
12 share of the facility, and bills for those services under Franciscan's Commercial Payer
13 Contracts, (4) relates to the employment of physicians or recruitment of physicians
14 as potential employees of Franciscan or TDC, (5) relates to complying with any law
15 or regulation regarding out-of-network or "surprise" balance billing by providers who
16 contract with Defendants to provide services to Defendants' patients, or (6) relates to
17 a transaction or arrangement for which Defendants gave notice pursuant to § IV, and
18 for which the time periods specified in § IV have expired.
19

20
21 49. Franciscan and TDC agree that for a period commencing on the Effective Date
22 and continuing until the earlier of seven (7) years from that date or the effective date of a
23 Washington State law that would otherwise require them to notify the AGO of transactions not
24 reportable under Hart-Scott-Rodino: neither Franciscan nor TDC shall, directly or indirectly,
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1 through subsidiaries or otherwise, without providing sixty (60) days advance written notice to
2 the AGO:

- 3 a. Enter into any arrangement with a group of Physicians including seven or more
4 Physicians, who are not Franciscan employees, when they already employ
5 Physicians who practice in the same specialty within a geographic area that is
6 within 15 (fifteen) miles of any of the facilities at which the non-employed
7 Physicians practice, under which Franciscan will establish Commercial Payer
8 contracts for those non-employed Physicians.
9
10 b. If, within thirty (30) days after giving notice, the AGO makes a written request
11 for additional information or materials, Franciscan shall not consummate the
12 transaction until thirty (30) days after substantially complying with such request.
13
14 c. This Consent Decree does not prohibit such arrangements or transactions, and
15 they may proceed after notice and expiration of the time periods set forth above.
16 Nothing in this section shall be construed, however, as a limit on the AGO's
17 authority to challenge such arrangements or transactions under the Consumer
18 Protection Act or any other applicable state or federal law at any time.
19
20 d. Notices, requests for additional information, and information and documents
21 provided to the AGO under § IV shall be kept confidential by the State, and shall
22 not be subject to disclosure under the Washington Public Records Act or any
23 other statute.
24
25 e. This notice requirement does not apply to transactions in which Physicians
26 become employees of Franciscan or TDC.

- 1 f. This notice requirement does not apply to arrangements that existed before this
2 Consent Decree was entered; however, this notice requirement does apply to
3 amendments of such arrangements that result in Franciscan establishing
4 Commercial Payer Contracts on behalf of Physicians for whom it previously did
5 not.
6
7 g. This notice requirement does not apply to the Rainier Health Network (“RHN”).
8
9 h. This notice requirement does not apply to arrangements or transactions for which
10 notice has previously been given pursuant to § IV.

11 50. Franciscan and TDC agree that until the earlier of seven (7) years from the
12 Effective Date or the effective date of Washington State law that would otherwise require
13 Franciscan and TDC to notify the AGO of transactions not reportable under Hart-Scott-Rodino,
14 pursuant to each new Qualified Arrangement or amendment thereto after this Consent Decree is
15 entered, in which Franciscan or TDC is a participant, except for those contracts under which
16 Franciscan or TDC is, or will be, paid on a capitated (per member per month) rate by the Payer,
17 Franciscan and TDC shall notify the Attorney General in writing at least sixty (60) days prior to:

- 18 a. Participating in, organizing, or facilitating any discussion or understanding with
19 or among any Physicians or Physician Groups in such Qualified Arrangement
20 relating to price terms or conditions of dealing with any Commercial Payer; or
21
22 b. Contracting with a Commercial Payer, pursuant to a Qualified Arrangement,
23 concerning price or other terms or conditions of dealing with any Commercial
24 Payer, on behalf of any Physician or Physician Group in such Qualified
25 Arrangement.
26

1 Provided, that:

- 2 a. This notice requirement does not apply to transactions in which Physicians
3 become employees of Franciscan or TDC.
4
5 b. This notice requirement does not apply to arrangements that existed before this
6 Consent Decree was entered; however, this notice requirement does apply to
7 amendments of such arrangements that result in Franciscan establishing
8 Commercial Payer Contracts on behalf of Physicians for whom it previously did
9 not.
10
11 c. This notice requirement does not apply to the Rainier Health Network ("RHN").
12
13 d. This notice requirement does not apply to arrangements or transactions for which
14 notice has previously been given pursuant to § IV.

15 51. Any notification under § IV shall include the following information:

- 16 a. the total number of Physicians and the number of Physicians in each specialty
17 Participating in the arrangement;
18
19 b. a description of the arrangement, including its purpose and geographic area of
20 operation;
21
22 c. a description of the nature and extent of the integration and the efficiencies
23 resulting from the arrangement;
24
25 d. an explanation of the relationship of any agreement on prices, or contract terms
26 related to price, to furthering the integration and achieving the efficiencies of the
arrangement;

1 e. a description of any procedures proposed to be implemented to limit possible
2 anticompetitive effects resulting from the arrangement or its activities;

3 **Provided further that:**

- 4
- 5 i. if, within fifteen (15) days from the date of the Attorney General's receipt
6 of the Notification, the Attorney General makes a written request for
7 additional information, then Franciscan or TDC shall not enter into the
8 arrangement described in the Notification prior to the expiration of thirty
9 (30) days after substantially complying with such request, or such shorter
10 waiting period as may be granted in writing by the Attorney General;
- 11 ii. the expiration of any waiting period described herein without a request
12 for additional information, or without the initiation of an enforcement
13 proceeding, shall not be construed as a determination by the Attorney
14 General that the proposed Arrangement does or does not violate this
15 Consent Decree or any law enforced by the Attorney General;
- 16
- 17 iii. the absence of the notice that the proposed Arrangement has been
18 rejected, regardless of a request for additional information, shall not be
19 construed as a determination by the Attorney General that the proposed
20 Arrangement has been approved;
- 21
- 22 iv. Notices, requests for additional information, and information and
23 documents provided to the AGO under § IV shall be kept confidential by
24 the State, and shall not be subject to disclosure under the Washington
25 Public Records Act or any other statute.
26

1 52. On January 1, 2020, the provisions of Substitute House Bill 1607 (“AN ACT
2 Relating to notice of material changes to the operations or governance structure of participants
3 in the health care marketplace”), shall substitute for the notice requirements of this Consent
4 Decree, and § IV of this Consent Decree shall be of no further force or effect, except that
5 paragraph 48 will continue to remain in effect.
6

7 **V. INCENTIVE AND QUALITY COMPENSATION**

8 53. Franciscan and TDC shall amend the PSA to remove the following clause from
9 Exhibit A, section 3.g in the PSA: “To the extent that FMG establishes any ‘incentive
10 compensation’ or quality bonus amount for FMG providers under the terms of the FMG
11 Compensation Plan, these do not affect the determination of the FMG Rates.” This does not
12 require Franciscan or TDC to offer any incentive compensation or quality bonus to any
13 physician.
14

15 **VI. SEPARATE COMMERCIAL PAYER CONTRACT NEGOTIATIONS FOR**
16 **TDC PHYSICIAN SERVICES**

17 54. Franciscan shall offer each Commercial Payer the option to negotiate the price
18 and other terms of Commercial Payer Contracts for Physician Services provided by TDC
19 Physicians at locations in KP/BI separately and independently from Commercial Payer Contracts
20 for Physician Services provided by Franciscan.

21 55. If a Commercial Payer elects to negotiate separately for Physician Services
22 provided by TDC Physicians at locations in KP/BI, agreed terms will be implemented as a
23 confidential amendment to the Commercial Payer’s contract with Franciscan. TDC will then bill
24 the payer on behalf of Franciscan as it does today. Franciscan will receive the revenue, and will
25 pay TDC on a wRVU basis and pay TDC’s expenses pursuant to the PSA as it does today.
26

1 56. For Commercial Payers who elect separate negotiations, Franciscan shall not:

- 2 a. make any Commercial Payer Contract for Physician Services for Franciscan
3 contingent on the Commercial Payer's agreement to prices or terms for Physician
4 Services provided by TDC Physicians; or
5 b. make the availability of any price or term included in a Commercial Payer
6 Contract for Physician Services for Franciscan contingent on the Commercial
7 Payer's agreement to prices or terms for Physician Services provided by TDC
8 Physicians.
9

10 57. No later than sixty (60) days after the Effective Date, Franciscan and TDC shall
11 establish and thereafter maintain the Franciscan Negotiating Team and the TDC Negotiating
12 Team, which teams shall operate independent of each other and negotiate prices and other terms
13 for Physician Services at locations in KP/BI, separately and in competition with each other and
14 other providers of Physician Services for those Commercial Payers who elect to negotiate
15 separately with TDC and Franciscan for Physician Services.
16

- 17 a. The TDC Negotiating Team (which may include consultants or other agents hired
18 to conduct the negotiations) shall be exclusively responsible for negotiating
19 prices and other terms for Physician Services provided at locations in KP/BI by
20 TDC Physicians when Payers have elected to negotiate separate prices and other
21 terms pursuant to § VI of this Consent Decree.
22

- 23 b. The Franciscan Negotiating Team shall be exclusively responsible for negotiating
24 Commercial Payer Contracts for Physician Services provided at locations in
25
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1 KP/BI for Franciscan when Payers have elected to negotiate separate prices and
2 other terms pursuant to § VI of this Consent Decree.

3 58. Commercial Payer Contracting Information with respect to separately-negotiated
4 prices and terms for Physician Services provided at locations in KP/BI by TDC Physicians shall
5 be kept separate and confidential from Franciscan Commercial Payer Contracting Information.
6

7 a. Commercial Payer Contracting Information with respect to such contracts shall
8 not, directly or indirectly, be transmitted to or received by the Franciscan
9 Negotiating Team, except as otherwise provided in this Consent Decree; and

10 b. Commercial Payer Contracting Information with respect to Franciscan shall not,
11 directly or indirectly, be transmitted to or received by the TDC Negotiating Team.
12

13 59. No later than thirty (30) days after the Effective Date, Franciscan and TDC shall
14 implement procedures and protections to ensure that Commercial Payer Contracting Information
15 relating to separately-negotiated prices and terms for Physician Services provided at locations in
16 KP/BI for Franciscan, on the one hand, and TDC, on the other, is maintained separate and
17 confidential, including but not limited to:

18 a. establishing a firewall-type mechanism that:

19 i. prevents the TDC Negotiating Team from requesting, receiving, sharing,
20 or otherwise obtaining any Commercial Payer Contracting Information
21 with respect to Franciscan's separately-negotiated contracts for Physician
22 Services provided at locations in KP/BI; and

23 ii. prevents the Franciscan Negotiating Team from requesting, receiving,
24 sharing, or otherwise obtaining any Commercial Payer Contracting
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- 1 Information with respect to separately-negotiated prices and terms for
2 Physician Services provided at locations in KP/BI by TDC Physicians;
3
4 b. causing each of Franciscan's employees and agents with access to Commercial
5 Payer Contracting Information with respect to Franciscan's separately-negotiated
6 contracts for Physician Services provided at locations in KP/BI to maintain the
7 confidentiality required by the terms and conditions of this Consent Decree,
8 including but not limited to:
- 9 i. requiring each such employee or agent to sign a statement that the
10 individual will comply with these terms;
 - 11 ii. maintaining complete records of all such statements at Franciscan's
12 headquarters; and
 - 13 iii. providing an officer's certification to the AGO stating that such
14 statements have been signed by all relevant employees and agents,
15 identifying such employees and agents, and certifying that no TDC
16 Negotiating Team member has had authorized access to the Commercial
17 Payer Contracting Information with respect to Franciscan's
18 separately-negotiated contracts for Physician Services provided at
19 locations in KP/BI.
20
21
- 22 c. causing each of Franciscan's employees and agents with access to Commercial
23 Payer Contracting Information with respect to separately-negotiated prices and
24 terms for Physician Services provided at locations in KP/BI by TDC Physicians
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1 to maintain the confidentiality required by the terms and conditions of this
2 Consent Decree, including but not limited to:

3 i. requiring each such employee or agent to sign a statement that the
4 individual will comply with these terms;

5 ii. maintaining complete records of all such statements at Franciscan's
6 headquarters; and

7 iii. providing an officer's certification to the AGO stating that such
8 statements have been signed by all relevant employees and agents,
9 identifying such employees and agents, and certifying that no Franciscan
10 Negotiating Team member has had authorized access to the Commercial
11 Payer Contracting Information with respect to separately-negotiated
12 prices and terms for Physician Services provided at locations in KP/BI by
13 TDC Physicians.
14

15
16 d. causing each of TDC's employees and agents with access to Commercial Payer
17 Contracting Information with respect to separately-negotiated prices and terms
18 for Physician Services provided at locations in KP/BI by TDC Physicians to
19 maintain the confidentiality required by the terms and conditions of this Consent
20 Decree, including but not limited to:

21
22 iv. requiring each such employee or agent to sign a statement that the
23 individual will comply with these terms;

24 v. maintaining complete records of all such statements at TDC's
25 headquarters; and
26

1 vi. providing an officer's certification to the AGO stating that such
2 statements have been signed by all relevant employees and agents and
3 identifying such employees and agents.

4
5 60. Nothing in this Consent Decree shall prevent the TDC Negotiating Team from:

- 6 a. requesting, receiving, sharing, using or otherwise obtaining Commercial Payer
7 Contracting Information with respect to Physician Services provided at locations
8 in KP/BI by TDC Physicians, except that such Commercial Payer Contracting
9 Information shall not be shared with the Franciscan Negotiating Team; or
10 b. requesting, receiving, sharing, using or otherwise obtaining non-Commercial
11 Payer Contracting Information relating to Franciscan Medical Group, Harrison
12 Medical Center or the entire Franciscan system, including, but not limited to,
13 information related to costs, quality, patient mix, service utilization, experience
14 data, budgets, capital needs, expenses, and overhead.

15
16 61. Nothing in this Consent Decree shall prevent the Franciscan Negotiating Team
17 from:

- 18 a. requesting, receiving, sharing, using, or otherwise obtaining Commercial Payer
19 Contracting Information with respect to Physician Services for Franciscan, except
20 that such Commercial Payer Contracting Information shall not be shared with the
21 TDC Negotiating Team; or
22 b. requesting, receiving, sharing or otherwise obtaining non-Commercial Payer
23 Contracting Information relating to Franciscan Medical Group, Harrison Medical
24 Center or the entire Franciscan system, including, but not limited to, information
25
26

1 related to costs, quality, patient mix, service utilization, experience data, budgets,
2 capital needs, expenses, and overhead.

3 62. If a Commercial Payer does not elect to negotiate separately after being offered
4 the option to do so, nothing in this Consent Decree shall prohibit Franciscan from requesting or
5 obtaining Commercial Payer Contracting Information with respect to Physician Services for
6 Franciscan and for Physician Services provided at locations in KP/BI by TDC Physicians for
7 that particular Commercial Payer or from using that Commercial Payer Contracting Information
8 for that particular Commercial Payer with respect to the negotiations and contracting for that
9 particular Commercial Payer Contract.
10

11 63. Nothing in this Consent Decree shall prevent the Commercial Payer Department
12 from requesting Commercial Payer Contracting Information from the Franciscan Negotiating
13 Team or the TDC Negotiating Team, *provided, however*, that:
14

- 15 a. the Commercial Payer Contracting Information that is requested and obtained is
16 used solely for the purpose of Contract Administration, and
17 b. the Commercial Payer Department is prohibited from providing, sharing, or
18 otherwise making available Commercial Payer Contracting Information:
19 i. from the TDC Negotiating Team to or with the Franciscan Negotiating
20 Team; or
21 ii. from the Franciscan Negotiating Team to or with the TDC Negotiating
22 Team.
23

24 64. Franciscan shall, solely at the option of the Commercial Payer and with no
25 penalty to the Commercial Payer, allow Commercial Payers with Pre-existing Commercial Payer
26

1 Contracts the option to re-open and renegotiate their contracts solely with regard to Physician
2 Services provided by TDC Physicians under the terms of this Consent Decree:

3 a. No later than thirty (30) days after the Effective Date, Franciscan shall notify all
4 Commercial Payers with a Pre-existing Commercial Payer Contract of their rights
5 under this Consent Decree, and, for each such Pre-existing Commercial Payer
6 Contract, offer the opportunity to negotiate a separate Commercial Payer
7 Contract for Physician Services provided at locations in KP/BI for TDC on the
8 one hand and Franciscan on the other hand.

10 b. Franciscan shall send notification of the above requirement and a copy of this
11 Consent Decree to the Commercial Payer employees who supervise negotiation
12 of, and negotiate contracts for, each such Commercial Payer by first class mail or
13 e-mail, with return receipt requested, and keep a file of such receipts for three
14 (3) years after the Effective Date.

16 i. Franciscan shall maintain complete records of all such notifications at
17 Franciscan's headquarters, and

18 ii. Franciscan shall provide an officer's certification to the AGO stating that
19 such notification program has been implemented and that Franciscan has
20 complied with its provisions.

22 65. No later than ten (10) days after being contacted by a Commercial Payer to
23 negotiate a Commercial Payer Contract, Franciscan shall notify said Commercial Payer of its
24 rights under this Consent Decree by sending a copy of this Consent Decree to the Commercial
25 Payer employees who supervise negotiation of, and negotiate contracts for, each such
26

1 Commercial Payer by first class mail or e-mail, with return receipt requested. Franciscan shall
2 maintain complete records of all such notifications and return receipts at Franciscan's
3 headquarters and shall include in reports filed to the AGO an officer's certification to the AGO
4 stating that such notification requirement has been implemented and is being complied with.
5

6 66. Franciscan shall:

7 a. Within thirty (30) days after the Effective Date, submit a verified written report
8 to the AGO setting forth in detail:

9 i. the manner and form in which it will comply with Paragraphs [54-57] of
10 this Consent Decree, including but not limited to the composition,
11 structure, and intended operation of the Franciscan Negotiating Team and
12 the TDC Negotiating Team, including but not limited to who will
13 comprise the teams, who will supervise the teams, who will approve the
14 Commercial Payer Contracts, what instructions the team members will
15 receive, and other details necessary for the AGO to evaluate Franciscan's
16 compliance with this Consent Decree; and
17

18 ii. the manner and form in which Franciscan will comply with
19 Paragraphs [58-63] of this Consent Decree.
20

21 b. One (1) year from the Effective Date, annually for the next seven (7) years on the
22 anniversary of the Effective Date, submit a verified written report to the AGO
23 setting forth in detail the manner and form in which it has complied and is
24 complying with the Order. In each such verified written report, include, among
25 other things that are required from time to time, the following:
26

- 1 i. a full description of the efforts being made to comply with each Paragraph
2 of the Consent Decree;
3 ii. the identity of each member of the Franciscan Negotiating Team, the TDC
4 Negotiating Team, and the Commercial Payer Department.
5
6 c. Within sixty (60) days after Effective Date, and every sixty (60) days thereafter
7 until Franciscan has fully complied with paragraphs [64 and 44], and has obtained
8 the signed statements of all of Franciscan's employees and agents described in
9 Paragraph [59] and who are employed or otherwise retained by Franciscan as of
10 the Effective Date, submit a verified written report to the AGO setting forth in
11 detail the manner and form in which it has complied and is complying with those
12 paragraphs of the Consent Decree.
13

14 **VII. DIVESTITURE**

15 67. No later than one hundred twenty calendar days after the entry of this Consent
16 Decree, Franciscan shall complete the divestiture of the Divestiture Assets in a manner consistent
17 with this Consent Decree to an Acquirer acceptable to and approved in advance by both
18 Franciscan and the AGO. Franciscan's time for divesting the Divestiture Assets will be tolled
19 during the pendency of any proceedings relating to a Certificate of Need for the divestiture,
20 including any request for a determination of whether a Certificate of Need is required. The AGO,
21 in its sole discretion, may agree to one or more extensions of this time period. The Court may
22 grant extensions upon motion, for good cause shown. Franciscan agrees to use its best efforts to
23 divest the Divestiture Assets as expeditiously as possible. Franciscan may retain a minority
24 interest in the ASC, and have reserved powers as a minority owner pursuant to the terms that
25
26

1 Franciscan and the Acquirer negotiate through an arms-length transaction and agree upon as
2 reflected in the Divestiture Agreement.

3 68. Not later than ten (10) days prior to its execution, Franciscan shall furnish a copy
4 of any Divestiture Agreement to the AGO.

5 69. Franciscan shall not, without prior notification to the AGO, directly or indirectly,
6 through subsidiaries, partnerships, or otherwise;

7 a. Acquire a controlling interest in the ASC;

8 b. Acquire any stock, share capital, equity or other interest in any concern, corporate
9 or non-corporate, that owns or has a controlling interest in the ASC.

10 70. If Franciscan has not accomplished such divestiture(s) within the time required
11 by this order (including any extensions authorized under this order), Franciscan shall promptly
12 file with the Court a report setting forth (1) Franciscan's efforts to accomplish the required
13 divestiture, (2) the reasons why the required divestiture has not been accomplished, and
14 (3) Franciscan's recommendations. To the extent such reports contain information that
15 Franciscan deems confidential, it shall follow the procedure outlined in the Stipulated Protective
16 Order in this matter, and file a redacted version of the report on the public docket of the Court.
17 Franciscan shall at the same time furnish such report to the AGO, which shall have the right to
18 make additional recommendations consistent with the purpose of this Consent Decree, and the
19 AGO reserves the right to seek the appointment of a trustee for the purposes of effectuating the
20 divestiture. To the extent necessary, the parties agree to reserve for argument before the Court
21 the extent of the trustee's authority. The Court thereafter shall enter such orders as it shall deem
22 appropriate to carry out the purpose of the Consent Decree.
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72. Nothing in this paragraph is intended to prevent Franciscan from increasing the amount, complexity, or acuity of procedures performed at the Ambulatory Surgery Center prior to effectuating the Divestiture.

IX. PATIENT NOTIFICATION OF COMPETITIVE ALTERNATIVES

75. Franciscan and TDC must provide this notice in writing at or before the time of the referral. The notice must include at least two alternative options on KP/BI that are not affiliated with Franciscan or TDC, if there are at least two such options available. The notice may be provided with other legally required notices in the electronic disclosure and consent forms that patients read and sign on an iPad at or before the time of the referral, provided that the patient is required to separately sign the laboratory and imaging services notice.

1 76. Franciscan and TDC shall not deny, limit, or withdraw a referral, if a patient
2 chooses to have services performed at a non-affiliated facility.

3 77. The notice in this Section shall be in a format approved in advance by the AGO.
4

5 **X. MONETARY RELIEF**

6 78. Within thirty (30) days of the Effective Date, Defendants shall pay two million
7 (\$2,000,000) United States Dollars by wire transfer to the State of Washington, Office of the
8 Attorney General. These funds shall be distributed solely as *cy pres* grants to be used for the
9 purpose of increasing access to healthcare for residents of KP/BI and/or availability of healthcare
10 services in KP/BI. All grants shall be awarded and disbursed at the sole discretion of the Attorney
11 General of Washington. The AGO represents and warrants that it has provided to Defendants
12 bank account information sufficient to facilitate the wire transfer prior to presenting this Consent
13 Decree to the Court.
14

15 79. To determine whether a new Certificate of Need is required under § VII, within
16 fourteen (14) days after a Divestiture Agreement has been executed, Franciscan shall work with
17 the Acquirer to submit a request to the Washington Department of Health (“DOH”) Certificate
18 of Need Program in the name of the Acquirer for a Determination of Reviewability pursuant to
19 WAC 246-310-050.
20

21 80. Franciscan shall use its best efforts to complete the Determination of
22 Reviewability, including, but not limited to, responding promptly to any inquiries or requests for
23 information from DOH.

24 81. If the DOH determines that a Certificate of Need is not required, Defendants shall
25 wire an additional five hundred thousand United States Dollars (\$500,000) to the State of
26

1 Washington, Office of the Attorney General to be used in the same manner as provided in this
2 § X. The Defendants shall do so within fourteen (14) days after a final and non-appealable
3 decision is rendered on the Determination of Reviewability by DOH.
4

5 **XI. ENFORCEMENT AND RETENTION OF JURISDICTION**

6 82. Jurisdiction is retained by this Court for the purpose of enabling the parties to this
7 Consent Decree to apply to this Court at any time for such further orders and directions as may
8 be necessary or appropriate for the construction or implementation of any of the provisions of
9 this Consent Decree, and for the enforcement of compliance, and to remedy violations of this
10 Consent Decree.

11 83. In any contempt of court proceeding initiated to enforce this Consent Decree due
12 to a violation of its terms, the AGO may seek, and the Court shall have the authority to grant, all
13 remedies available in such a proceeding.
14

15 84. Nothing herein precludes the AGO from enforcing the provisions of this Consent
16 Decree, or from pursuing any law enforcement action with respect to the acts or practices of
17 Defendant not covered by this Consent Decree or any acts or practices conducted after the date
18 of entry of this Consent Decree.

19 85. The State releases Defendants from all antitrust claims that the State asserted or
20 could assert based on the conduct alleged in the Complaint, and covenants not to sue on these
21 claims or for conduct that is obligated by this Consent Decree.
22

23 86. A final judgment is hereby entered dismissing the Complaint with prejudice in its
24 entirety, with the State and all Defendants to each bear their own attorneys' fees and costs.
25 All parties waive any right to appeal the entry of final judgment, the entry of this Consent Decree
26

1 or any order or judgment before entry of this Consent Decree, including the summary judgment
2 of the State's claim against WSO.

3 87. Nothing in this Consent Decree shall be construed to limit or bar any other
4 governmental entity (other than the State of Washington and its officials, agencies, and
5 subdivisions) from pursuing other available claims or remedies against Defendant.
6

7 88. This Consent Decree shall be construed and interpreted to effectuate the intent of
8 the parties, which is to provide for a complete resolution of all antitrust claims that the State
9 asserted or could assert based on the conduct alleged in the Complaint with respect to all
10 Defendants.

11 89. Neither the existence of this Consent Decree nor anything contained herein shall
12 be deemed or construed to be an admission by any Defendant or evidence of any wrongdoing or
13 violation of law by any Defendant, or the truth of any of the claims or allegations contained in
14 the Complaint.
15

16 90. Under no circumstances shall this Consent Decree or the names of the State of
17 Washington or the Office of the Attorney General, Antitrust Division, or any of its employees
18 or representatives be used by Defendant's agents or employees in connection with the promotion
19 of any product or service or an endorsement or approval of Defendant's past or future practices.
20

21 91. Solely for the purpose of determining or securing compliance with this Consent
22 Decree, Defendants authorize their attorneys of record in this case to accept service of a motion
23 by the AGO to enforce or interpret this Consent Decree.
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1 92. Unless otherwise provided in this Consent Decree, interpretation, enforcement,
2 or modification of this Decree shall be governed by federal law to the extent applicable;
3 otherwise, the laws of the State of Washington shall apply.
4

5 **XII. RECORDS RETENTION AND COMPLIANCE INSPECTION**

6 93. For the purpose of determining or securing compliance with this Consent Decree,
7 and subject to any legally recognized privilege, and upon written request and twenty one (21)
8 days' notice to Franciscan and TDC made to its headquarters address, Franciscan and TDC shall,
9 without restraint or interference, permit any duly authorized representative of the AGO:

- 10 a. Access, during business office hours of Franciscan or TDC and in the presence
11 of counsel, to all facilities and access to inspect and copy all books, ledgers,
12 accounts, correspondence, memoranda, calendars, and all other records and
13 documents in its possession, or under its control, relating to Franciscan's and
14 TDC's compliance with this Consent Decree, which copying services shall be
15 provided by Franciscan and TDC at the request of the authorized representative(s)
16 of the AGO and at the expense of Franciscan and TDC; and
17
18 b. To interview officers, directors, or employees of Franciscan and TDC, who may
19 have counsel present, regarding such matters.
20

21 94. In addition to the provisions in § VI, upon the written request of duly authorized
22 representative of the AGO, Franciscan and TDC shall submit written reports, under oath if
23 requested, relating to any of the matters contained in this Consent Decree as may be requested.

24 95. No information or documents obtained through the foregoing means shall be
25 divulged by the AGO to any other person other than an authorized representative of the AGO,
26

1 except in the course of legal proceedings to which the AGO is a party (including grand jury
2 proceedings), or for the purpose of securing compliance with this Consent Decree, or as
3 otherwise required by law.

4 **XIII. NOTIFICATIONS**

5
6 96. All notices issued pursuant to this Consent Decree shall be issued with a reference
7 to the case caption and number, to the following:

8 To Plaintiff State of Washington:

9 Erica Koscher
10 Amy Hanson
11 Assistant Attorneys General
12 Antitrust Division
13 Office of the Attorney General of Washington
14 800 5th Ave, Ste. 2000
15 Seattle, WA 98104

16 To Defendants:

17 Franciscan and WSO

18 Mitchell D. Raup
19 Matthew Hans
20 Herbert Allen
21 Polsinelli PC
22 1401 I Street NW, Suite 800
23 Washington D.C. 20005

24 The Doctor's Clinic

25 Douglas C. Ross
26 David A. Mass
Douglas E. Litvack
Davis Wright Tremaine LLP
920 5th Avenue, Suite 3300
Seattle, WA 98104

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1 /s/ Jonathan A. Mark

2 JONATHAN A. MARK, WSBA No. 38051

3 AMY N.L. HANSON, WSBA No. 28589

4 ERICA A. KOSCHER, WSBA No. 44281

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20
21 ***Attorneys for Defendants Franciscan Health System, Franciscan Medical Group, and***
22 ***WestSound Orthopaedics, P.S.***

23
24 /s/ Douglas Litvack

25 Douglas Litvack
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28 ***Attorneys for Defendant The Doctors Clinic, a Professional Corporation***